United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig & Affidavit & Stipulation

77-1026

To be argued by
RONALD G. RUSSO

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1026

UNITED STATES OF AMERICA,

Appellee,

—against—

IRVING HAIMSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Preliminary Statement

This is an appeal by the defendant Irving Haimson from a judgment of conviction of the United States District Court for the Eastern District of New York (Pratt, *J.*), entered on December 17, 1976 following entry of a plea of guilty to a superseding information.[1] Defendant was convicted of conspiring to possess merchandise stolen while moving in interstate commerce in violation of Title 18, United States Code, Section 371. He was sentenced to a six month jail term and placed on probation for a period of two-and-a-half years. In addition, defendant was also

[1] In pleading guilty, by agreement with the Government and with the consent of the district court, Haimson reserved the right to appeal the denial of his motion to suppress. *See, United States* v. *Faruolo*, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

fined $2,500. Execution of the sentence has been stayed pending this appeal (153).[2]

On this appeal, appellant claims that the district court erred in denying his motion to suppress certain evidence relating to the stolen goods and certain statements made by defendant in connection with the seizure of that merchandise. The appellant urges upon this Court a number of points which can be categorized into two arguments. The first is the contention that the search which uncovered the subject evidence, although conducted after appellant had given his consent, was nonetheless unreasonable and illegal since neither a search warrant nor exigent circumstances were present. The second argument appellant poses is that the district court committed clear error in holding that there was nothing contradictory in the testimony elicited at the hearing.

Statement of Facts

A. Evidence at the Suppression Hearing

The uncontroverted testimony given at the suppression hearing established that a shipment of 633 cartons of shoes, valued at approximately $180,000 and being shipped by truck between Brooklyn, New York and Brattleboro, Vermont, was hijacked on February 13, 1976 (5-6). On the evening of February 17, 1976, certain reliable confidential information was received by Agent Patrick Colgan of the Federal Bureau of Investigation, who was responsible for the investigation of this hijacking.[3] That information indicated that the stolen mer-

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[2] All references are to appellant's Appendix, unless otherwise noted.

[3] At the suppression hearing Agent Colgan and Agent Donald Dowd testified on behalf of the government. The defendant did not call any witnesses.

chandise was in a warehouse near the intersection of the Van Wyck Expressway and Atlantic Avenue in Brooklyn (7).

Acting on this information, Agent Colgan went to the area alone on February 18, 1976, familiarized himself with the neighborhood and the buildings where the goods might be stored. He was unable to locate the goods on that day (8). On the following morning, Agent Colgan returned to the area with eight or ten other agents (9). The agents contacted the managers of two or three warehouses and obtained consent to search their premises but were unable to find the merchandise. Following these efforts, Agent Colgan, together with Agent Dowd, came upon the premises known as 139-11 95th Avenue. As they were walking in front of this building, Agent Colgan noticed that the overhead doors of the truck bay were opened and some five to eight cartons could be seen from the street (12; 27). From his position Colgan observed that the cartons bore certain markings which identified them as part of the stolen cargo (13; 27). Colgan asked Dowd to inform the other agents who were standing nearby of their findings, waited several seconds for Dowd to return and, together, they stepped onto the loading platform and entered the warehouse (28).

Upon entry the agents walked toward the rear of the warehouse where two men were in conversation. Agent Colgan, after identifying himself, questioned the men as to who owned the premises. One of them, the defendant Irving Haimson, indicated that he rented the entire premises (31). Colgan, at this point informed the defendant of the purpose of his presence and told him of the observations he had made from the street. He advised Haimson that he would like to search the premises but told him that he did not have to consent to a search but could request a search warrant. The uncontroverted

testimony indicates that Haimson "stated he understood the constitutional rights to demand a search warrant, however, that wouldn't be necessary and that he would consent to search the premises" (32; 119). After consenting to the search, the defendant led the agents to the rear section of the building where the balance of the stolen merchandise was found.

B. The Ruling On the Motion to Suppress

After receiving the evidence on the motion to suppress, the court heard arguments. Appellant argued that due to the absence of exigent circumstances, it was improper for the agents to proceed without a warrant or to request consent to search. The proper procedure, he contends, was for the agents to have sought a search warrant before requesting consent. In response, the Government, conceding the absence of exigent circumstances, contended that where a voluntary consent is given without duress or trickery a valid search may be conducted notwithstanding the absence of a warrant. The district court having "received the testimony, observed the witnesses and studied the exhibits presented" found that although there was time to obtain a warrant the agents had no obligation to do so as defendant consented to the search. Finding that "Haimson's consent to the search was validly and intelligently given after being informed of his rights" (14), the district court held:

> Colgan testified, without contradiction, that Haimson indicated that he understood what his constitutional rights were, and told the agents that a warrant would not be necessary. Haimson went further than that, moreover, since he led the agents to the cartons which had been originally seen from the street, and then pointed out the remaining

> cartons to Colgan. There is nothing in the evidence to suggest coercion, fear, trickery, overbearing of the defendant's will, or any other circumstance which might invalidate the consent whose evidence is so clear on this record (A-15).

ARGUMENT

POINT I

It was proper for the FBI agents to conduct a consent search without first seeking a search warrant, notwithstanding the absence of exigent circumstances.

Appellant's main point on this appeal is that the absence of exigent circumstances places a burden upon federal agents to seek a search warrant before seeking consent to search. To establish that premise, appellant cites the Fourth Amendment and a number of cases holding that warrantless searches are *per se* unreasonable. Appellant does, however, concede that certain exceptions have been carved out of this fundamental principle. In citing several well known exceptions to the principle, appellant significantly fails to enumerate the "consent search" as one of those exceptions. There can be no doubt that "the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment." *United States* v. *Matlock*, 415 U.S. 164, 165 (1974); *See also, Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Zap* v. *United States*, 328 U.S. 624, 630 (1946). As this Court has stated, "[i]t long has been recognized that consent to a search justifies a warrantless intrusion." *United States* v. *Ellis*, 461 F.2d 962, 967 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972). Contrary to appellant's

contention, the fact that there was ample time and probable cause to obtain a warrant will not invalidate a search conducted pursuant to a voluntary consent. *Bumper* v. *State of North Carolina*, 391 U.S. 543 (1968); *Anderson* v. *United States*, 399 F.2d 753, 756 (10th Cir. 1968).

The case of *United States* v. *Airdo*, 380 F.2d 103 (7th Cir.), *cert. denied*, 389 U.S. 913 (1967), is strikingly on point and particularly illustrative. In *Airdo* two F.B.I. agents conducting an investigation into the theft of a shipment of television sets went to defendant's home. They had no search warrant. A woman with whom the defendant was living admitted them into the apartment house hallway and the agents preceeded her up the stairs. From their position in the haliway outside her second floor walk-up apartment the agents, through the opened door, saw a television set in the apartment. The agents expressed the belief that the set might be stolen and requested permission to inspect it. Having received permission, the agents inspected the set and determined that it was stolen. At the suppression hearing one of the agents testified that the woman was advised that the agents were conducting an investigation relating to stolen television sets, that they wished to inspect the television set in her apartment but that she did not have to permit inspection because the agents did not have a warrant. It was the agent's testimony that the woman offered her full cooperation stating she had nothing to hide. Upon these facts the Court found that the consent given was valid and affirmed the admission of the questioned evidence stating:

> The occasion for requesting permission to inspect the television set arose after the agents were admitted to the apartment. Nothing in Miss Hilan's testimony indicates that she felt constrained to cooperate or that her actions consti-

tuted an involuntary submission to authority. 380 F.2d at 106.[4]

The occasion for requsting permission to inspect the goods in the instant case came when the agents, while still on the street, saw a portion of the stolen load through the open bay door.

These facts stated above also answer appellant's further contention that the agents' initial entry onto appellant's premises was illegal. The stolen goods were visible from the street; the doors were open; clearly there is not the slightest evidence in the record of an expectation of privacy. Appellant claims he "conducted a private trucking business" (Appellant's Brief, p. 14). That contention simply does not accord with the record which established that appellant was in the trucking business, that he occupied a warehouse which was not secured and that there was unrestricted access to the public. It simply does not lie with the appellant to claim that "those persons who desired to do business with the defendant were invited to enter, but certainly not the F.B.I." (Appellant's Brief p. 14). Moreover, assuming that the initial entry was improper, the subsequent consent to search by defendant vitiates, we submit, any impropriety. Cf. *United States* v. *Ellis*, *supra* at 967; *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969); *United States* v. *Cataldo*, 433 F.2d 38, 40 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971).

Appellant further argues that the consent was given as a result of coercion. This argument is without any merit. There is not the slightest suggestion in the un-

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[4] It should be added parenthetically that the search in *Airdo* was held valid notwithstanding the fact that a co-tenant rather than defendant authorized the search. The instant appeal is cerainly less compelling as defendant himself consented.

controverted testimony elicited during the hearing that the consent was other than voluntary. The evidence shows that the agents introduced themselves, told defendant the purpose of their presence, indicated that they did not have a warrant and that defendant need not consent to a search as he has a constitutional right to a warrant. Having all this information, the defendant freely chose to permit a search. Appellant claims that he was "between Scylla and Charybdis" in that a refusal to search would suggest guilt and an acquiesence to search would result in defendant's "being hanged." It is respectfully submitted that when an individual knowingly possesses the fruits of a crime a request to search invariably presents those alternatives. Indeed, appellant's contention that he really had no choice but to submit to a search was properly answered by this Court in *United States* v. *Gorman*, 355 F.2d 151 (2d Cir. 1965). Appellant there argued that it was incredible that he would voluntarily consent to a search which would surely reveal incriminating evidence. Therefore, the argument ran, consent must have been involuntary. The response by this Court was unambiguous:

> Acceptance of this contention would mean that expressions of consent would relieve officers of the need to obtain a warrant only when the speaker was not aware that the search would disclose damaging evidence—a fact usually not within the officer's knowledge. Such a ruling not only would almost destroy the principle permitting a search on consent but would enable experienced criminals to lay traps for officers who, relying on the words of consent, failed to secure a search warrant that would have been theirs for the asking. Where, as here, no force or deception was either used or threatened, we see no reason why a court should disregard a suspect's expression of consent simply

> because efficient and lawful investigation and his own attempt to avoid apprehension had produced a situation where he could hardly avoid giving it. *United States* v. *Gorman*, *supra*, at 159.

It is respectfully submitted that it was wholly proper for the F.B.I. agents to conduct a consent search, notwithstanding the absence of a search warrant or exigent circumstances. Indeed, adopting appellant's argument would mean that a consent search could only be employed after a warrant was sought and the request denied. No court has ever relegated a consent search to so absurd a position.

POINT II

There was no contradictory testimony on any essential issue.

Appellant argues that it was plain error for the district court to find that "nothing in the testimony was found to be contradictory or incredible." Appellant's entire argument on this point, however, is clearly based upon a typographical error in the transcript. Appellant's brief refers to the allegedly contradictory testimony of Agent Dowd who, rather than testifying to an "open door" as did Agent Colgan, testified that he and Colgan "approached *and opened a door* of 135-11 95th Avenue . . ." (Appellant's Brief, p. 26). Appellant argues that Dowd's testimony establishes that there was a material inconsistency in the testimony, Colgan saying they came upon an open door, Dowd testifying that they opened it. It appears clear, however, from the certified and corrected page 117 of the trial transcript filed with this court, that the testimony by Agent Dowd was: "Agent Colgan and myself approached *an open bay door* of 135-11 95th Avenue". That being the testimony, it is clear that the district court was correct in holding that "no contradictory testimony was presented" (A-9).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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That on the 18th day of April 1977 he served a copy of the within

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New York, New York 10001

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Dolores M Byrd

Sworn to before me this

18th day of April 1977

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No. 24-4501966
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